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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

In re C.S., Jr., et al., Persons Coming  
Under the Juvenile Court Law.

TULARE COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

S.H.,

Defendant and Appellant.

F058356

(Super. Ct. No. J0560513)

**OPINION**

**THE COURT**\*

APPEAL from orders of the Superior Court of Tulare County. Charlotte A. Wittig, Commissioner.

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen Bales-Lange, County Counsel, John A. Rozum and Amy-Marie Costa, Deputy County Counsels, for Plaintiff and Respondent.

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\* Before Vartabedian, Acting P.J., Cornell, J., and Gomes, J.

S.H. (mother) appeals from an order terminating parental rights (Welf. & Inst. Code, § 366.26) to her son and daughter.<sup>1</sup> Mother contends the court erred by: denying her petition (§ 388) for reunification services; finding the children likely to be adopted; and rejecting her argument that termination would be detrimental to the children. She concludes by arguing the court violated her due process rights when it terminated her rights because she was not an unfit parent. On review, we disagree with each of mother's claims and affirm.

### **PROCEDURAL AND FACTUAL HISTORY**

The Tulare County Superior Court exercised its dependency jurisdiction over five-year-old C. and his two-year-old sister H. and removed them from parental custody in September 2008. Mother, who has an extensive substance abuse history, was under the influence of controlled substances, specifically methamphetamine, in August 2008. She also used in the children's presence. Her son C. could describe how and where mother injected herself with drugs. Her substance abuse placed the children at a continuing risk of suffering serious physical harm or illness due to their young ages and inability to protect themselves. (§ 300, subd. (b).)

In removing the children from parental custody, the court made the following findings by clear and convincing evidence. First, there was or would be a substantial danger to the children's physical health, safety, protection, or physical or emotional well-being if it were to return the children home to mother. Second, there were no reasonable means by which the children's physical health could be protected without removing them from parental custody. (§ 361, subd. (c)(1).)

At the dispositional hearing, the court also denied both parents reunification services. The court did so in mother's case, having found she had a history of extensive,

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<sup>1</sup> All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

abusive, and chronic use of drugs or alcohol and resisted prior court-ordered treatment for this problem during the three-year period immediately prior to the filing of the petition. (§ 361.5, subd. (b)(13).) The court also could not find it was in the children's best interest to order reunification services at that point. The following evidence supported the Court's findings.

***Mother's Prior Resistance to Court-Ordered Drug Treatment***

Two and a half years earlier in 2006, the same court ordered mother into a drug rehabilitation program as part of juvenile dependency services to reunify mother with then two-year-old C. She had been under the influence while caring for the child in January 2006. Mother did complete the drug rehabilitation program. Indeed, she made such substantial progress that the court returned C. to her custody, subject to family maintenance services, in September 2006.<sup>2</sup>

Mother tested positive for methamphetamine once again in May 2007. The next month she attempted to falsify her urine sample in an effort to trick the drug testing facility. She did so for fear her own urine would test positive for illegal substances. Nevertheless, in January 2008, the court terminated jurisdiction over C. and awarded mother sole custody.

Mother, however, showed continued resistance to her drug treatment. She was arrested in July 2008 for possession of 49 hypodermic needles and drug paraphernalia found in the residence she shared with the children. Mother admitted a 10-year history of using methamphetamine. She reportedly last used within days before her arrest. Around the same time, adults twice found five-year-old C. out in the neighborhood and unsupervised. Mother was under the influence of methamphetamine at least once more in August 2008 when she was again arrested and the children detained.

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<sup>2</sup> Mother gave birth to her daughter H. soon thereafter.

### ***Court Sets and Continues a Section 366.26 Hearing***

Having denied the parents reunification services, the court concluded its September 2008 dispositional hearing by setting a section 366.26 hearing to select and implement a permanent plan for the children. Although the court calendared the section 366.26 hearing for a January 2009 date, it did not conduct the hearing until August of that year. Much of the eight-month delay was attributable to mother's continuance requests in order to belatedly obtain a bonding study.

In the interim, Maria Kallai, an adoptions worker with respondent, Tulare County Health and Human Services Agency (agency), filed a series of reports with the court.<sup>3</sup> In her reports, Kallai consistently recommended that the court find the children adoptable and terminate parental rights. The children were likely to be adopted. Kallai's reasoning changed somewhat, however, over the ensuing months, as discussed below.

### ***Adoptability Evidence***

Initially, the children were adoptable because they were young, an intact sibling set, and their current foster parents wished to adopt. The foster parents, with whom the children were placed in September 2008, were committed to providing them with a safe, stable, happy and healthy home. The couple obtained their foster care license and accepted placement of the children with adoption as the plan. C. as well as his sister H. appeared very attached to their foster mother. The children were very happy in the foster home and appeared closely bonded to their foster parents whom they addressed as mommy and daddy.

This was the tenth placement for C. and the third placement for H. C. had been in seven different placements during his first dependency. The first foster home placement for both children in August 2008 lasted less than two weeks because it was found to be

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<sup>3</sup> A court-appointed special advocate (CASA) also filed reports with the court.

inappropriate. The second foster family felt incapable of managing the children and asked that they be removed within another two weeks.

From the outset, five-year-old C. presented with some significant emotional problems. Following his August 2008 detention, C. screamed at night and feared monsters. He was also too friendly with strangers; he would approach strangers in a store for a hug. He hoarded food and overate. He needed reassurance that the refrigerator and pantry were always full. He told lies about his sister and seemed uninterested in her. The foster parents spent two months working with him daily and repeatedly to teach him empathy and concern for his sister. As of January 2009, he was seeing a counselor on a weekly basis for Reactive Attachment Disorder (RAD). C. had been diagnosed with RAD during his previous dependency in 2006. Therapy was also initiated to help C. process what he had witnessed in terms of mother's drug abuse.

Both children improved dramatically and thrived in their current placement. C.'s tantrums lessened to the point that he might only be upset for a minute or two. He also improved at school. However, despite the excellent parenting and therapy C. received since his removal, he continued to display behaviors suggesting anger and sadness. He still had nightmares and sleepwalking episodes after visits with mother. His behaviors and mood swings were also erratic from one day to the next. They ran the gamut from appropriate and compliant to major tantrums and telling lies. According to his therapist, C. told stories when he did not get his way or when he did not want to comply. His occasional mention of his birthmother, whom he referred to in therapy by her first name, was mixed with accounts of Spiderman and acting out scenes of aggression.

Starting in March 2009, the foster parents expressed reservations about adopting the children. Although the foster parents wished to keep the children and work with C. and his therapist, the foster parents were not inclined to adopt at that time. There had been several changes in C.'s day-to-day routine at home and in school, starting in the

later part of January 2009 and C. had not responded well to the transitions and changes. His negative behaviors escalated.

In addition, it appeared C. might be expressing opposition and defiance in his attachment to the foster mother. He had some awareness that the permanency of his current placement was undetermined and mother was requesting services. Until these issues were clarified, it was unlikely C. would be able to stabilize and reconnect with the foster mother.

Further, a psychiatrist diagnosed C. with a psychotic disorder in addition to RAD. C.'s symptoms included hallucinations, mood swings, and violent assaults. Because simple behavioral interventions failed, the psychiatrist recommended antipsychotic medication for C. Mother, however, declined to approve the psychiatrist's recommendation.

The court in turn ordered a second opinion regarding C. by a child psychiatrist. In the process, the court observed C. had been seen for a medical issue at the University of California, San Francisco Medical Center (UCSF), and ordered that the psychiatrist, who recommended the antipsychotic medication for C., be provided all of C.'s medical history.

C.'s medical issue was a rare syndrome causing his body to absorb more water than normal. Drinking too much water could lead to serious results. However, following an April 2009 visit to the UCSF Endocrinology clinic, C. reportedly looked good, had good growth, and good blood pressure. Unless his lab work was abnormal, C. would only have to visit the clinic once a year.<sup>4</sup>

In addition, a pediatric ophthalmologist in the spring of 2009 diagnosed C. with optic nerve hypoplasia. He could not see out of his left eye beyond six feet. He was

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<sup>4</sup> The record later revealed C.'s lab test results were within normal range.

under the ophthalmologist's care to treat the problem.

The court-ordered second psychiatric opinion confirmed C. should be on mood stabilizer medication. Any atypical antipsychotic medication might be a reasonable choice. The child psychiatrist also opined C. could benefit from a consistent placement because placement issues could be a stress on C. and could be a reason for his acting out behavior. The child psychiatrist confirmed the diagnosis of psychotic disorder and RAD. He also assessed C. as having bipolar disorder.

As the school year wound down, C.'s behaviors improved both at home and in school. Daily communication between the school and the foster parents helped. C. could be acknowledged for his good behaviors in home and at school. He could no longer manipulate situations and would confess to his behavior. He continued to respond well to praise and positive feedback. An IEP was also developed for him based on his emotional problems.

In addition, C. once again showed affection and admiration especially for the foster mother. C. appeared very comfortable in the foster home. He did not talk about mother and did not appear sad or withdrawn. The foster parents remained committed to caring for both children and meeting their needs. The foster mother reported she and her husband had fallen in love with the children.

As of early July 2009, C. was having fewer tantrums, from two to three times a day to three a week. With the benefit of in-home services, it was observed he was held accountable for the falsehoods he told and he more often admitted to the lie. He was sometimes more compliant as well. As long as C. had an adult with him, he was all right. According to his therapist, C. was learning still to tell the truth and not get upset. He was obstinate but had made some progress. The agency continued to await word as to whether the psychiatrist and the endocrinologist had resolved whether the recommended antipsychotic medication would affect C.'s medical condition.

The children remained adoptable as an intact sibling set that should remain together. Kallai, the adoptions worker, added the children had no significant medical or developmental issues. The intensive mental health services for C. were having a positive effect on his behavioral issues. The foster parents wanted to wait to see if the court approved medication for C. and if so, the effect it would have on C.'s behaviors before making a final decision.<sup>5</sup> Although the children were adoptable, locating the most appropriate adoptive family might take longer and require more time.

### ***Visitation and Relationship with Mother***

Reports from the adoptions worker and CASA also addressed the children's visits and relationship with mother. She visited the children once a week on a supervised basis. In general, the visits went well. The children appeared to enjoy themselves. Mother was attentive to their needs. C. initiated and reciprocated affection with mother while H. did not.

Mother brought food and clothes to the visits with the children and spent considerable time preoccupied with what she brought. It was mother who initiated and maintained interaction during the visits with the children. She also frequently identified herself as "mommy." The children sought mother out for food and beverages. They appeared to enjoy these visits where they were feted with sodas, fast food, and new clothes.

At the end of visits, the children were matter-of-fact, composed and ready to leave. They waved and repeated their goodbyes as well as responded to mother's request for a hug. They looked forward to returning to their foster mother. They also were eager to greet their transporter and did not show any distress departing from mother.

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<sup>5</sup> The court approved psychotropic medication for C. after parental rights were terminated.

C. tended to say at the end of visits that he wanted to see his mommy. He seemed to qualify his request by saying “my other mommy,” an apparent reference to his foster mother. Two or three times after visiting with mother, he appeared to sleepwalk into different parts of the foster home.

Despite mother’s regular visits, the children’s primary bond seemed to be with their foster parents. It did not appear termination of parental rights would be detrimental to the children. According to Kallai, the children did not appear to have a deep bond or significant attachment with mother. The parent-child relationship was superficial and not genuine. Kallai based her clinical impression on the visits she supervised and the reports on visits an aide supervised, as well as on Kallai’s decade worth of work in adoptions and two decades in mental health. Although C. spent more time with mother than in foster care, the quality of his relationship with her did not seem significant.

In addition, C.’s weekly visits with mother contributed to the child’s confusion as to who was his mother and to which parent he owed allegiance. In May 2009, C. reportedly said he was ““seeing things”” after visits with mother. There were monsters in his dreams. The monsters were at his mother’s house and used to talk to him. C. would often wake up crying and screaming.

The foster mother also observed the children would talk about the snacks mother brought them at visits. Once mother stopped bringing snacks, C. stated he no longer wanted to go on visits. The foster father stated C. tended to act up after visits. C. also reportedly referred to mother as “my fake mom.” The foster mother believed C. struggled with the idea of two mothers.

### ***Mother’s Section 388 Petition***

In July 2009, mother petitioned (§ 388) to modify the court’s September 2008 orders denying her reunification services, placing the children with the foster parents, and setting the section 366.26 hearing. She alleged she had completed parenting classes, a

drug rehabilitation program, and leadership training. She also claimed she was closely bonded with the children, especially C. Attached to her petition was the written bonding study her attorney had sought.

### ***Bonding Study***

Psychologist Marcelle Pratt described the process she followed in conducting her bonding study. She reviewed the court records that mother's attorney made available, interviewed mother, met separately with the two children, and observed structure play activities between mother and each of the children. In her description of C., the psychologist noted he acknowledged some confusion over what to call mother and the foster mother and he sometimes worried about where he would be living. When asked to name his wishes, C. said he would like to have a "huge house" and a "Mom and Dad and sister." He wanted them to live in his house.

Dr. Pratt's overall impressions from observing the family interactions was that mother could be nurturing although at times she was not attuned to the children's needs and either forced herself upon them or became hurt when the children rejected her. This was indicative of a somewhat insecure attachment.

Mother also was unable to complete a majority of the structured play activities with the children. Of the few she did complete, she demonstrated she could gauge the children's level of cognitive development. However, mother seemed to have difficulty being a parent who was directive, confident of her ability to guide the children, and able to attend to more than one child at a time without feeling overwhelmed. Her inability to provide structure led mother to try and connect with the children by following them in their play activity. This led to confusion about who was the leader or the parent.

Dr. Pratt concluded by offering some opinions. She believed the attachment between C. and mother was significantly different and stronger than the attachment between H. and mother. It was difficult to assess the quality of the attachment between

H. and mother because at times no attachment was apparent. By contrast, there was an apparent emotional attachment and significant bond between C. and mother. They enjoyed each other's company. However, at times the quality of the attachment was not positive such as when mother failed to provide a strong parental figure for C. to follow or mother relied on acting as a child in order to engage with C.

The psychologist also opined the impact of parental rights termination would be significantly different for each child. The impact would likely be less significant for H. She likely might be at risk for slowed development of social skills and interpersonal relationships. By contrast, the loss of mother was likely to interfere with C.'s emotional development. His mental health diagnosis indicated that he had a great deal of difficulty with emotional regulation and impulse control. Although mother had been unable to provide adequate parenting for him at times, C. had been able to establish a significant attachment with her and sought out her affection and attention. Although much about C.'s life had been unstable and unpredictable, mother had been the one permanent person in his life since birth. It was important not to minimize the immediate and long-term impact that termination of parental rights would have on C.

In reaching her opinions on the impact of parental rights termination, the psychologist emphasized current research that a number of life-long emotional problems frequently occur when children are removed from their parent in the early developmental years. Such children could experience a wide-range of negative emotional issues, including lack of self-esteem, difficulty developing close or intimate relationships, and lack of ability to trust others. The loss of a parent could also create a sense of aloneness and abandonment.

### ***Response to Mother's Section 388 Petition and the Bonding Study***

In a "Follow-up" report, the adoptions worker noted the bonding study suggested C.'s relationship with mother was that of a child-to-child or friend-to-friend and the

quality of the attachment between C. and mother was not positive. The adoptions worker also emphasized the bonding study's observation that mother had difficulty parenting both children at the same time.

Although opposed to reunification services for mother, the agency commended mother's efforts to reform her life. If she could maintain sobriety, the adoptions worker added the foster parents were open to maintaining a relationship between the children and mother.

The court set the mother's section 388 petition for hearing on the same date as the section 366.26 hearing. In turn, the adoptions worker filed a written response to the section 388 petition. The response summarized mother's history with child welfare services dating back to 2004.

In addition, the adoptions worker observed the children's weekly visits with mother had hindered C.'s ability to attach. This was manifested by several of C.'s behaviors, such as opposing parental directives, hitting, kicking and pushing others to get his way or to express his feelings, C.'s lack of remorse and failure to accept responsibility, making statements of harm, and acting out behaviors when in school. In addition, the current delay in the section 366.26 hearing, which the adoptions worker attributed to mother, had hindered a sense of permanency for the children.

One of C.'s therapists also questioned the bonding study. She stated "if you put any adult in a room with C[,] he is going to seek their attention and will eventually challenge boundaries." Also, the person who transported the children to the bonding study reported that during the entire drive there, C. kicked the back of the driver's seat saying "I don't want to see S[.]" in reference to mother.

### ***Combined Evidentiary Hearing***

At the combined section 388 and section 366.26 hearing in August 2009, mother, the maternal grandmother, and Dr. Pratt testified.

Mother described completing a three-month residential drug treatment program and a one-month aftercare program since the court denied her services in September 2008. She also attended Narcotics Anonymous meetings, completed parenting classes, and started a nursing program. She hoped to complete nursing school in 2013. For the past 11 months, she also called in everyday for drug testing. All of her drug tests have been “clean.”

Mother admitted she had “parenting issues” and probably needed extra parenting classes. She also believed therapy would be helpful for both her and the children.

Mother testified as well about her weekly visits with the children. When the children first saw her, they ran to her and immediately wanted her attention. Both children became “super excited” and were affectionate. They asked about what she brought them. She always tried to bring them something. The children interacted with each other and with her. The children also showed jealousy during the visits.

During visits, C. asked to go to the park or asked mother to go to his house. He questioned why she could not go to his house. At one visit, he told mother he wanted her to get a house so he, his sister and mother could be a family again. He said he wondered why they were not together.

H. asked mother to fix her hair and give her piggyback rides. The child also told mother she loved her. She called mother “Mommy” and her foster mother “Mom C[.]”

At the end of their visits, mother left first. Most times, according to mother, C. tried to follow her out the door. He asked if she could come to his house and if she would be there (the visitation center) next week. Her daughter H. behaved differently when visits came to an end. Sometimes she cried, but she did not follow mother as much as C. did.

Mother felt she had remained close to both children. C. had not given her any indication that he did not feel close to her. On the other hand, her closeness with H. had weakened.

Mother believed it would be in the children's best interest to have more visits. They always had a great time.

Mother admitted she previously had been in "rehab" but "this last time" she got a lot out of it. In addition, she previously had been in three out-patient programs. This time she finished all of her 12 steps and was held accountable. She did not believe she had been held accountable previously and she was just going through the motions. Her state of mind was different now.

In the past, she was dishonest and did not wholeheartedly do her steps. She further admitted she had falsified information for the court in the past. This time she had to actually have a sponsor who met with her counselors in the drug treatment program.

Having started nursing school, mother felt she had a future and she would like her children to be a part of it. It would benefit them because they would have their mother and she had a lot of support.

She admitted she had access to and obtained needles for her own drug use through her previous employment. When asked how entering the nursing profession would be different, mother replied she would have to work on her "rehab problem." She was doing that by attending "Christ-based rehab" every week. Asked why she should be believed now, mother could not directly address the question. Rather, she promised she could achieve anything. She would not go back.

The grandmother testified about accompanying mother on some visits with the children. According to the grandmother, C. had a warm and affectionate relationship both with her and with mother. The grandmother heard C. tell mother he loved her and missed her. He also asked to go home with his mother as well as to go to the park.

The grandmother also noticed a change in mother since the children were detained. Now, mother was “totally towing the line” and “wholeheartedly” interested in changing her life. The witness did not feel this was the case prior to the children’s detention. She believed mother needed her continued support as well as that of the maternal grandfather and mother’s extended family. The grandmother was not a big part of mother’s life during C.’s previous dependency.

The grandmother, who was a registered nurse, did not have any concerns about mother entering the nursing profession given her substance abuse issues, especially using needles. In the grandmother’s view, mother deserved this one chance.

Dr. Pratt testified about the activities she had mother perform with the children as a tool in assessing the “relationship attachment bond” between parent and child. There are four measures the assessment looks at: a caregiver’s ability to provide structure to, engage, nurture and challenge a child. Mother had difficulty with most of these. At times, those qualities in mother were very weak. In some of the activities, those qualities were not there at all. In one activity, C. put himself in the role of parent over his mother. There was some role confusion in terms of who was in charge. Sometimes mother was in charge. Sometimes the child was.

When C. stated he would like a huge house as well as a mom, dad, and sister to live in it, Dr. Pratt assumed C. was referring mother. The psychologist acknowledged at trial that C. could have been talking about his foster parents.

C. definitely saw mother as his parent. He looked to her for approval and to share with her his interests during their session together. At times, he did not follow her. Nevertheless, Dr. Pratt felt there was definitely the sense that mother was his parent.

The evidence that C. did not want to attend the bonding study and see mother did not surprise Dr. Pratt. The psychologist imagined there was a lot of anger directed at mother which “certainly [was] not a great thing.” This did not affect Dr. Pratt’s

evaluation because she had some issues with the quality of the attachment, which was frequently weak in her view, between C. and mother. Dr. Pratt also did not see C. interact with any other adults so she did not know if he would seek the attention or affection of another adult who was important to him.

If C. were to return to an environment where the parenting definitely needed strengthening, that would be more harmful than a stable foster home. Because mother was the parent who had been in C.'s life throughout and because C. was an at-risk child, Dr. Pratt felt there would be a detrimental impact to C. if his parent were removed from his life.

If C. were diagnosed with RAD, he would have a problem attaching to his mother. During the "couple of hours" she spent with the children and mother, Dr. Pratt did not see symptoms of RAD in C.

If told that the children referred to the foster parents as mommy and daddy and referred to mother by her first name, Dr. Pratt testified it would be tough to say whether that would change her evaluation. She believed children attempt to adjust to the environment they are in so that referring to mother by her first name could be situational or due to confusion.

Following closing arguments, the court denied mother's section 388 petition. The court acknowledged mother had made some very positive changes. However, given all the facts before it, the court could not find there had been a sufficient change of circumstances. Even assuming there was, the court did not find it would be in the children's best interests to delay permanence and stability while reopening reunification services. Turning to the section 366.26 issues, the court found both children were adoptable and their relationship with mother was not sufficiently beneficial that it outweighed the benefits adoption would bring to the children.

## DISCUSSION

### **I. Denial of Mother's Section 388 Petition.**

Mother contends the court abused its discretion by denying her section 388 petition. In mother's view, her circumstances had changed since September 2008 when the court removed the children from her custody and denied her reunification services. She rehabilitated herself and had a promising future. In addition, she argues a grant of relief would have served the children's best interest because they shared a bonded and loving relationship with her and had been in many failed foster homes. She adds she is the only person who has remained in the children's lives. She further cites their foster parents' uncertainty over adoption.

A parent may petition the court for such a modification on grounds of change of circumstance or new evidence. (§ 388, subd. (a).) The parent, however, must also show that the proposed change would promote the best interests of the child. (§ 388, subd. (b); Cal. Rules of Court, rule 1432(c) (now rule 5.570).)

Whether the juvenile court should modify a previously made order rests within its discretion and its determination may not be disturbed unless there has been a clear abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318 (*Stephanie M.*).) When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court. (*Id.* at pp. 318, 319.)

In this case, the court properly found mother's circumstances had not sufficiently changed. She was currently making some positive changes in her life. However, mother's history of rehabilitation and relapse undermined her recent accomplishments and supported the court's determination.

Wisely, though, the court did not stop its analysis there. Giving mother the benefit of doubt regarding changed circumstances, the court also considered the children's best interest. On this point, the court properly found it would not be in their best interest to

delay permanence and stability while reopening reunification services. (*Stephanie M.*, *supra*, 7 Cal.4th at p. 317.)

As the California Supreme Court explained in *Stephanie M.*, by the time a child's dependency has reached the permanency planning stage, a parent's interest in the care, custody, and companionship of the child is no longer paramount. Rather, the focus shifts to the child's needs for permanency and stability, and, in fact, there is a rebuttable presumption that continued out-of-home care is in the best interests of the child. A court hearing a modification petition at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child. (*Stephanie M.*, *supra*, 7 Cal.4th at p. 317.)

Here, mother did not introduce any evidence, yet alone establish, that the children's need for permanency and stability would be advanced by ordering more reunification services for her. Rather than confront this issue and the lack of proof supporting her position, mother resorts to comparing the facts in *Stephanie M.* with her view of the facts here. In so doing, she misses the point of *Stephanie M.*

In addition, we fail to see how the foster parents' uncertainty over adoption advances mother's argument in favor of renewed reunification services. She also overlooks the couple's willingness and considerable efforts, in any event, to provide ongoing care for the children. Mother fails as well to appreciate her son's heightened need for stability given the emotional problems with which he struggled and the harm to him apparently brought on by the delay and uncertainty in these proceedings.

Having reviewed the record, we conclude the court did not abuse its discretion by denying mother's section 388 petition.

## **II. Adoptability.**

Mother next challenges the court's finding that it was likely the children would be adopted. She claims the agency's evidence on the issue was not clear and convincing.

She also cites the foster parents' recent uncertainty about adoption, C.'s mental health problems and rare medical condition, as well as the children's special needs, their multiple failed placements, and her claim that they are bonded to her as proof that the children not adoptable.

Before a court may terminate parental rights, it must find by clear and convincing evidence that it is likely the dependent child will be adopted. (§ 366.26, subd. (c)(1).) The adoptability question focuses on the dependent child, e.g., whether his or her age, physical condition, and emotional state make it difficult to find a person willing to adopt. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) It is not necessary that the child already be in a potential adoptive home or that there be a proposed adoptive parent "waiting in the wings." (*In re Jennilee T.* (1992) 3 Cal.App.4th 212, 223, fn. 11.)

To the extent mother argues the evidence of the children's adoptability was not clear and convincing, she overlooks the fact that the "clear and convincing" standard of proof is not a standard for appellate review (*Crail v. Blakely* (1973) 8 Cal.3d 744, 750). Whether evidence is clear and convincing to establish a given fact is primarily a question for the trial court to determine. If there is substantial evidence to support its conclusion, the determination is not open to review on appeal. (*Ibid.*)

The foster parents' commitment to adopt both children faltered, as C.'s behaviors worsened at home and at school due to changes in his routine and because recommended drug treatment to help him was deferred. However, there remained evidence that the children were adoptable because they were young, formed an intact sibling set, and had no significant medical or developmental problems. The agency did add "the children present with some significant emotional problems which will be evaluated and

recommendations made for treatment.”<sup>6</sup> Yet, the children also demonstrated an ability to make dramatic progress and thrive as well as to love and be loved. They had also successfully remained in the same placement for nearly a year and were able to form a bond with their foster parents. Further, the court properly could infer that C. would stabilize upon termination. There was the evidence that the services he received had a positive effect on his behavioral issues. There was also the evidence that his recent acting out behaviors could be explained at least, in part, by the stress caused by placement issues, the fact that the permanency of his current placement had been undetermined, and the question of whether mother would receive services.

The remaining factual question was whether the foster parents would eventually become the children’s adoptive parents. However, that uncertainty did not compel the court to find the children were not adoptable since it is neither necessary that a child already be in a potential adoptive home or that there be a proposed adoptive parent waiting in the wings. (*In re Jennilee T.*, *supra*, 3 Cal.App.4th at p. 223, fn. 11.).

In conclusion, there was substantial evidence to support the court’s adoptability finding.

### **III. Parent - Child Relationship.**

Mother further argues the court should have found termination would be detrimental to the children based on her relationship with them. On review, we conclude the court did not abuse its discretion by rejecting her argument in favor of a detriment finding.

Section 366.26, subdivision (c)(1)(B), acknowledges termination may be detrimental to a dependent child under specifically-designated and compelling

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<sup>6</sup> While the record is replete with evidence regarding C.’s emotional problems, there is no evidence that H. has any significant emotional problem. At most, she had a speech delay when she entered foster care.

circumstances. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.) One of those circumstances is when a parent has maintained regular visitation and contact and the child would benefit from continuing the relationship to such a degree that the child would be greatly harmed by termination. (§ 366.26, subd. (c)(1)(B)(i); *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 [beneficial relationship exception].)

A finding that termination would not be detrimental, however, is not a prerequisite to the termination of parental rights. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1347.) The statutory presumption is that termination and permanency through adoption is in the child's best interests and therefore not detrimental. (§ 366.26, subd. (b); *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1344.) A party opposed to termination bears the burden of showing that termination would be detrimental under one of the statutory exceptions. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.)

Consequently, when a court rejects a detriment claim and terminates parental rights, the appellate issue is not whether substantial evidence exists to support the court's rejection of the detriment claim. The issue for the reviewing court is instead whether the court abused its discretion in rejecting the detriment claim. (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.) For this to happen, the proof offered would have to be uncontradicted and unimpeached so that discretion could be exercised only in one way, compelling a finding in favor of the appellant as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 570-571; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.)

Courts examine the beneficial relationship exception on a case-by-case basis, taking into account the many variables which affect a parent/child bond. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) "The age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs are some of the variables which logically affect a parent/child bond." (*Ibid.*)

Here, it is undisputed mother maintained regular visitation and contact with her children throughout their dependency. At the time of section 366.26 hearing, six-year-old C. and three-year-old H. had spent at least half of their respective lives in mother's custody. However, the children were graphically exposed to their mother's drug abuse while in her custody.

Mother's interaction with the children could be positive in that she was attentive, appropriate, and loving during visits. To the extent the children enjoyed themselves, there was conflicting evidence regarding whether it was due to spending time with mother or because she feted them with sodas, fast food, and other treats. This raised a question about whether the relationship was superficial or genuine. The professional opinions on this point were also conflicting. There was undisputed evidence, however, that once mother stopped bringing snacks, C. stated he longer wanted to go on visits with her. While mother testified the end of visits could be difficult for the children, especially C., there was conflicting evidence that the children were matter-of-fact, composed, and ready to leave. They looked forward to seeing their transporter and their foster mother.

Further, there was evidence that after visits, C. tended to act up. After some visits, he also had nightmares, hallucinated, and sleepwalked.

In any event, to the extent mother relies on her own testimonial description of the visits, she overlooks not only the conflicting evidence regarding the quality of those visits, but also the law's requirement that she demonstrate more than pleasant visits or frequent and loving contact. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 953-954.)

This brings us to the requirement that in order for the beneficial relationship exception to apply,

“the parent-child relationship [must] promote the well-being of the child to such a degree that it outweighs the well-being the child would gain in a permanent home with new, adoptive parents. (*In re Autumn H.*[, *supra*,] 27 Cal.App.4th [at p.] 575.) A juvenile court must therefore: ‘balance[] the

strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.' (*Id.* at p. 575.)" (*In re Lorenzo C.*, *supra*, 54 Cal.App.4th at p. 1342.)

Once again, the evidence on this point was conflicting. However, even Dr. Pratt's report and testimony in support of mother's position was less than compelling. The court properly may have given her opinions little weight. The psychologist used an assessment tool – for evaluating the relationship attachment bond between parent and child – that measured four parenting attributes and mother had difficulty with most of these. In some activities, mother's qualities were very weak, in others the requisite qualities were not there at all. Nevertheless, the psychologist opined there was an apparent emotional attachment and significant bond between at least mother and C. and that termination would detrimentally impact C. Although at times there was no apparent attachment between mother and her daughter, the psychologist still believed the child could be at risk. Further, the court properly may have considered the fact that Dr. Pratt relied on research couched in terms of possible, rather than likely or actual, harm.

Thus, we conclude the court did not abuse its discretion by rejecting mother's claim of a beneficial relationship with her children.

#### **IV. Parental Unfitness.**

Finally, mother claims the court never found her to be an unfit parent. She acknowledges the court exercised its dependency jurisdiction based on her inability to provide the children with regular care due to her drug abuse. However, she asserts there was no evidence that the children suffered in her care and consequently the court could not find she was unfit. She therefore contends she was denied due process such that the court could not terminate her parental rights. We disagree. The law and the facts in this case do not support mother's claim.

Before the state may sever a parent's rights in his natural child, due process mandates the state's allegations be supported by evidence that is, at a minimum, clear and convincing. (*Santosky v. Kramer* (1982) 455 U.S. 745, 747-748 (*Santosky*).) Once the state has shown a parent unfit, the juvenile court may then assume the child's interests have diverged from those of his or her natural parent. (*Id.* at p. 760.)

California's dependency system comports with *Santosky*'s requirements because, by the time parental rights are terminated at a section 366.26 hearing, the juvenile court must have previously found that the parent was unfit. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254 (*Cynthia D.*).) A court's finding of detriment, i.e. that awarding custody of a dependent child to a parent would be detrimental to the child, is the equivalent of an unfitness finding. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 423.)

The statutory grounds to remove a child from parental custody – as in this case, there was a substantial danger to the children's physical or emotional well-being and that there are no reasonable means to protect them without removal from parental custody – are established under a clear and convincing standard (see § 361, subd. (b)). (*Cynthia D.*, *supra*, 5 Cal.4th at p. 253.) To further deny a parent reunification services, as in this case, also requires clear and convincing proof (§ 361.5, subd. (b)) and constitutes an additional finding of unfitness. (*In re P.A.* (2007) 155 Cal.App.4th 1197, 1212.) Thus, by the time of the section 366.26 hearing, these prior determinations ensure the evidence of detriment to the child is already so clear and convincing that more cannot be required without prejudice to the interests of the child. (*Cynthia D.*, *supra*, 5 Cal.4th at p. 256.)

Mother's reliance on *In re Gladys L.* (2006) 141 Cal.App.4th 845 (*Gladys L.*) is misplaced. *Gladys L.* addressed a situation involving a nonoffending parent. The department had pled and the juvenile court exercised dependency jurisdiction in *Gladys L.* based solely on the conduct of the other parent. More importantly, the juvenile court in *Gladys L.* never made any detriment finding as to the nonoffending parent. It was

under those circumstances that the appellate court in *Gladys L.* concluded there was no finding of unfitness as to the nonoffending parent and therefore his parental rights could not be terminated. (*Gladys L.*, *supra*, 141 Cal.App.4th at p. 848.)

Here, the agency pled and the juvenile court exercised dependency jurisdiction based on undisputed evidence of the mother's neglect of the children. More importantly, the court made detriment findings by clear and convincing evidence when it removed the children from mother's custody and denied her reunification services. (*In re P.A.*, *supra*, 155 Cal.App.4th at p. 1212.) Consequently, the court did not violate mother's due process when it terminated parental rights.

#### **DISPOSITION**

The order terminating parental rights is affirmed.